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Supreme Court of the United States

OCTOBER TERM, 1949

No. 230

SWIFT & COMPANY PACKERS, et al.,
Petitioners and Appellants Below,

versus

COMPANIA COLOMBIANA DEL CARIBE, SA.,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EBERHARD P. DEUTSCH
and
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Proctors for Petitioners.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.

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COMPANIA COLOMBIANA DEL CARIBE, SA.,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Questions Presented.

The important questions of law presented for determination in this proceeding are:

1. Has a district court of the United States, sitting in admiralty, discretion to decline jurisdiction of a proceed-

ing instituted by a citizen of the United States and others, against foreign respondents, for loss of cargo shipped between foreign ports under bills of lading expressly made subject to the Carriage of Goods By Sea Act of the United States?

2. Is the question as to whether a district judge of the United States, prior to his retirement, properly refused to decline discretionary jurisdiction of a proceeding in admiralty, open to review by his successor in office?

3. Has not a district court of the United States, sitting in admiralty, jurisdiction to determine for itself whether a vessel seized under process of foreign attachment is actually the property of a foreign respondent?

4. Does a mere proctor's affidavit on information and belief, to the effect that a vessel seized under process of foreign attachment is not owned by the respondent, filed in an admiralty proceeding in a district court of the United States in support of a motion to dismiss and vacate the attachment for want of jurisdiction of the court, place on the libelant the burden of showing why the vessel should be held and jurisdiction maintained; or should not jurisdiction be determined only after hearing of disputed facts on competent testimony?

II

Summary Statement of Matter Involved

The proceeding under review was instituted originally by libel in admiralty for loss during late January, 1948,

of a cargo of rice from the Motor Vessel CALI, which foundered while en route from Ecuador to Cuba. Half of the cargo was owned by Swift & Company Packers, a Nevada corporation, and the remainder by citizens of Cuba, except for one consignment owned by a Columbian.[1]

The Motor Vessel CALI was owned by Compania Transmaritima Colombiana, a Colombian corporation, hereinafter simply called Transmaritima. This company also owned another vessel called the ALACRAN. Libel was filed in behalf of Swift & Company and the other cargo owners, (each for its own interest), on March 7, 1948, in the District Court of the Canal Zone, against Transmaritima, jurisdiction being sought by attachment of the ALACRAN.[2]

The vessel was attached by the marshal on March 8,[3] and on the same day a supplemental and amended libel was filed, alleging that libelants had just learned that an attempt had been made, on or about March 4, 1948, to transfer the Steamship ALACRAN, renamed CARIBE, to a Colombian corporation just formed by the beneficial owners of Transmaritima, in anticipation of the assertion, and in fraud, of libelants' rights. This new corporation was Compania Colombiana Del Caribe, hereinafter simply called Caribe.[4]

It was further alleged that the attempted transfer of the vessel was fictitious, that the two companies were

[1] Libel, R 3 et seq. The shipments were all made under bills of lading expressly claused to be subject to the Carriage of Goods by Sea Act of the United States.
[2] Ibid.
[3] R 18-21.
[4] R 23 et seq.

actually one, and that Caribe was in fact the *alter ego* of Transmaritima. The amended libel prayed for attachment of the vessel in the hands of both companies, or in the hands of Caribe as in fact the property of Transmaritima or as security for the alleged purchase price in the purported act of sale.[5] To this supplemental libel, were annexed searching interrogatories, requiring Caribe to state under oath, all of the facts surrounding formation of that company, and the purported transfer of the vessel to it.[6]

The vessel was again attached by the marshal.[7] On March 15, the master of the vessel claimed her as property of Caribe,[8] and that company moved to dismiss the libel and vacate the attachment of the vessel on the grounds that the action was between foreigners, that the alleged fraudulent transfer of the vessel raised issues which ought to be decided only in Colombia, and that "no sufficient cause has been alleged why this court should hear this matter".[9]

Attached to this motion, was a document denominated an affidavit, executed by proctor for Transmaritima and Caribe, setting forth his argument in support of his motion,[10] annexing a copy of the "certificate of registry" of the vessel with the Colombian Consul in Panama on

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[5] Ibid.
[6] R 29-31. These interrogatories have never been answered (See post.).
[7] R 32-34.
[8] R 36-38.
[9] R 39-41.
[10] R 41-49. "On the same day the new company by its proctors made a motion, supported by an affidavit which is mainly a legal argument . . ." Opinion of Court of Appeals, p. 8.

March 4,[11] and the opinion of a Colombian lawyer that "the courts of justice of the Canal Zone completely lack jurisdiction" to decide the claim against Transmaritima and Caribe.[12]

On March 31, the judge of the district court overruled the motion to dismiss the libel and vacate the attachment, and refused to decline jurisdiction.[13] The district judge retired on the following day,[14] and none was appointed until later.[15]

On June 11, 1948, answers to the libel, as amended, were filed in behalf of both respondents.[16] Transmaritima's answer pleads in defense certain provisions of the Carriage of Goods Act of the United States,[17] and "invokes the benefit of the provisions of the Revised Statutes of the United States . . . in limitation of the liability of shipowners." [18]

Respondent Caribe, with its answer, filed exceptions to libelant's interrogatories which sought sworn information as to the formation of Caribe and the circumstances surrounding transfer of the vessel.[19]

On August 16, 1948, proctor for respondents again moved to dismiss the libel and vacate the attachment on

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[11] R 59-61. Such a certificate is not evidence of title or ownership. The Navemar, 303 US 68, 73.
[12] R 62-67.
[13] R 70-72.
[14] 75 F. Supp. x.
[15] 77 F. Supp. x.
[16] R 74-81.
[17] 49 Stat. 1207-13, 46 USC 1300-15.
[18] 27 Stat. 445, 46 USC 192.
[19] R 85-86.

substantially the same grounds as theretofore urged and overruled, with the added suggestion that the district court, sitting in admiralty, was without jurisdiction to determine the validity of the transfer of the vessel.[20]

In support of this renewed motion, proctor for respondents submitted another document in the form of an affidavit by himself, on information and belief, expanding somewhat on his prior statement, and alleging that the controlling interests in the two corporations are substantially different, although showing that Walter W. Keene and Eulogio Echaverri, stated to be managing director and "sub-manager" respectively of both companies, owned 51 out of 100 shares of Transmaritima, and 47 out of 50 shares of Caribe. This document also called attention to other proceedings on the same causes of action instituted by libelants in New York and Texas against the same respondents and against Keene as effective owner of both.[21]

On September 20, 1948, the new district judge upheld the motion to dismiss the libel and vacate the attachment, holding that he was without jurisdiction, sitting in admiralty, to determine whether the transfer of the vessel was valid, such inquiry being one to "be undertaken in the courts of the Republic of Colombia"; and, "in any event, this court as an admiralty court has the right

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[20] R 88-92.

[21] R 93-102. Excerpts from the proceedings in these cases which "reveal that Walter W. Keene, one of the principal stockholders, and director and manager of both respondent corporations" treated them "as his personal chattels" and "personally collected the insurance" on the M/V Cali (dissenting opinion of Judge McCord in Court of Appeals, pp. 17-18) are in the transcript of the instant case. R 121-156.

to refuse the assumption of such non-maritime jurisdiction and . . . does refuse to . . . inquire into any alleged scheme or device which may exist or may have been entered into between the two respective respondents in the Republic of Colombia".[22]

Libelants applied for a rehearing,[23] and on November 5, 1948, the district court rendered its opinion denying the rehearing, holding that on the face of the libel as amended, the court, as a court of admiralty, had no jurisdiction to inquire into the question as to whether the transfer of the vessel was fictitious and in fraud of libelant's rights; that on the face of the pleadings title to the vessel had passed to Caribe; and that, until a Colombian court should annul the transfer as fraudulent, the vessel "is the property of" Caribe, and "is not subject to the foreign attachment" in the Canal Zone.[24]

The decree of the district court, entered November 10, 1948, recites that the court has found that the Steamship CARIBE "was solely owned" by Caribe; and then, only after ordering release of the vessel from attachment, requires Caribe, within thirty days thereafter, to "make answer as garnishee respecting any and all funds, indebtedness, money or property which it owes or has in its hands, belonging to" Transmaritima.[25] Significantly, libelant's interrogatories annexed to its amended libel, seeking sworn information as to Caribe's formation by

[22] R 104-113. Under its quoted ruling, the district court felt that "it must be held that the vessel Caribe . . . was at the time of" her attachment "the property of" Caribe. R 112.
[23] R 114-116.
[24] R 157-166.
[25] R 167-170.

the interests in control of Transmaritima, and as to the purported transfer of the vessel, were never required to be answered prior to the entry of the order releasing her attachment.

Libelants appealed from this decree,[26] and on May 30, 1949, the Court of Appeals for the Fifth Circuit affirmed the decree, Judge McCord dissenting.

The majority of the Court of Appeals conceded that the "affidavit evidence and the exhibits" were "not of the most satisfactory kind", but held that these were sufficient to place the burden on the libelants, under the motion to dismiss the libel and vacate the attachment, "to show some cause why the vessel should be held as the property of respondents";[27] that there had been "no adjudication of the title";[28] that the jurisdiction of a district court, sitting in admiralty, to determine whether a transfer is fraudulent at the instance of one whose claim has not yet been reduced to judgment, "is doubtful";[29] and that, in any event, "there is a discretion, as the court

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[26] R 170-184.

[27] Opinion, p. 7. In his dissent, Judge McCord indicated that this burden was on libelants, at least "to prove their case by their pleadings", but nevertheless took "issue with the statement of the majority" that libelants had not "proved anything at all to support their contention . . . that the vessel is really the property of respondents". Opinion, pp. 17, 18.

[28] Opinion, p. 7. See also opinion on petition for rehearing, p. 2. As hereinabove noted, the district court had held in both its opinions (R 112, 164), as it had found in its decree (R 168) that the vessel was "solely owned" by Caribe. As stated by Circuit Judge McCord in his dissent on the petition for rehearing: "Although the majority claim there has been no adjudication of the title to the seized vessel . . . their decision is predicated on the theory that the respondent Caribe is the true owner of the vessel . . . They are actually deciding the case on its merits adversely to libelants without according them the hearing to which they are entitled." Opinion, p. 5.

[29] Opinion, p. 8.

held, to refuse enquiry, even if there be jurisdiction, where the case is about foreign business and the transaction was between foreigners . . ." [30]

Judge McCord dissented because of the "far reaching effect and import" [31] of the majority opinion as a precedent, which, he stated, "appears to be that when foreign ship owners are about to be haled into our courts to answer for their negligence they may escape liability by a fraudulent transfer and sale of their vessels in a foreign jurisdiction, and thereby effectively oust our Federal courts of admiralty jurisdiction in attachment proceedings." [32]

He called attention to the fact that Swift & Company, "who owned half of the entire cargo of the lost vessel, is a citizen of the United States"; [33] that Transmaritima itself had claused its bills of lading on which the lost cargo was shipped as having effect "subject to the Carriage of Goods by Sea Act of the United States"; [34] and that "the carrier knew, or should have known that it was dealing with a citizen of the United States as the ultimate owner of fifty per cent. of the entire cargo of the vessel". [35]

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[30] Ibid. "We have not held that the libel *in personam* was wholly between foreigners, and that jurisdiction over it might be for that reason declined." Opinion of majority on petition for rehearing, p. 2.

[31] Opinion, p. 9.

[32] Opinion, p. 19.

[33] Opinion, p. 14.

[34] Opinion, p. 16. Of particular significance in light of respondents' contention that the case is beyond the jurisdiction of the courts of the United States, are the defensive pleas in the answer of one respondent based on the Carriage of Goods by Sea Act (R 76, 77), and that it "invokes the benefit of the provisions of the Revised Statutes of the United States . . . in limitation of the liability of shipowners". R 79.

[35] Opinion, p. 16. The name of Swift & Company appears as notify party on its bills of lading. R 50, 53.

On these facts, Judge McCord was "inclined to the view that the district court had no discretion to decline jurisdiction", but that, "even if there be such discretion, the district court clearly abused its discretion in declining to exercise its jurisdiction on a mere summary motion to vacate the attachment, supported only by incompetent and hearsay affidavits and exhibits, when the jurisdictional facts were clearly in dispute." [36]

Judge McCord further found that "since the original judge in the above ruling had already considered the question of declining jurisdiction as a matter of discretion, libelants were entitled to rely upon his ruling, and the question of whether he properly exercised his discretion on the original motion was hardly open for review or further consideration by his successor in office." [37]

III

Reasons Relied on for Allowance of the Writ

The Court of Appeals for the Fifth Circuit, by a divided court, has decided important questions of federal jurisdiction which have not been, but should be, settled by this court, on one of which points there seems to be a direct conflict with a prior opinion of the Court of Appeals for the Ninth Circuit.*

That the questions decided are important, is emphasized in the dissenting opinions of one of the judges of the

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[36] Opinion, p. 14.

[37] Opinion, p. 16. In his opinion on rehearing, the successor judge himself pointed out that the motion which he sustained was that of March 15, 1948, which his predecessor had overruled. R 158.

* The Celtic Monarch, 138 Fed. 711 (CCA 9).

Court of Appeals who referred to the "far reaching effect and import" of the decision as a precedent under which "foreign ship owners . . . may . . effectively oust our federal courts of admirality jurisdiction in attachment proceedings"; and that "this is an important case, and the issues here decided will touch the business life of our Republic in a vital way".

Six opinions have been rendered in the case, three in favor of retention of jurisdiction by the district court, and three against it. The first district judge who heard the motion to dismiss and to vacate the attachment for want of jurisdiction, overruled the motion. The second district judge (successor to the first) simply reversed his predecessor, held that he was without jurisdiction, or legally entitled, in his discretion, to decline to take jurisdiction, sustained the motion to dismiss, and ordered the attachment dissolved.

Two judges of the Court of Appeals held that, on the basis of evidence "not of the most satisfactory kind", the district court was without jurisdiction, and that the district judge had the discretionary right to decline jurisdiction even though his predecessor in office had previously exercised that discretion in favor of jurisdiction. A third judge of the Court of Appeals, dissenting, held directly to the contrary on each point made in the majority opinion.

The dissenting judge of the Court of Appeals stated that he was "inclined to the view that the district court had no discretion to decline jurisdiction", and cited auth-

orities which, by analogy, support his view. The majority of the court held that "there is a discretion . . . to refuse inquiry, even if there be jurisdiction", but could find no authority to support its holding.

Similarly, while the dissenting judge found "ample authority" by analogy "for the proposition that a court of admiralty has jurisdiction to inquire into the ownership of property attached under its process, and into the *bona fides* of a sale of such property by a respondent, even where the purported assignment takes place prior to the attachment", the majority conceded that "we believe there is no precedent for what was attempted".

On petition for rehearing; the majority of the Court of Appeals wrote another opinion denying the application. The third judge, again dissenting, characterized the case as an important one whose issues "will touch the business life of our Republic in a vital way"; and deplored the fact that the majority "are actually deciding the case on its merits adversely to libelants without according them the hearing to which they are entitled".*

The issues in the case of *The Celtic Monarch*, cited in the foregoing footnote, it is submitted are practically identically the same as those in the case at bar; and the opinion of the majority in the case at bar, it is submitted, is almost directly contrary to that of the Court of Appeals for the Ninth Circuit in the cited case.

* "Upon these issues the libelant was clearly entitled to give evidence, and it is manifest that the merits of the cause could not properly be disposed of in advance of the determination of those issues". The Celtic Monarch, 189 Fed. 711, 718 (CCA 9).

It is further submitted that there is apparently no direct holding of this court on any of the questions preesnted in the case at bar, on which the opinions of the judges of the lower courts were so sharply divided. There can, in any event, hardly be any doubt as to the importance of the questions of federal jurisdiction involved, on one of which there is apparent conflict between the Courts of Appeal for the Fifth and Ninth Circuits. None of these questions has apparently been, and all of them should unquestionably be, settled by this court.

IV

Basis of Jurisdiction

Jurisdiction is invoked under section 1254 of Title 28 of the United States Code.

The original opinions of the Court of Appeals for the Fifth Circuit were filed May 30, 1949; petition for rehearing was filed June 17, 1949; and rehearing was denied with majority and dissenting opinions July 20, 1949.

WHEREFORE petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Court of Appeals for the Fifth Circuit; had in the case numbered and entitled on its docket, No. 12,608, *Swift & Company Packers, et al., appellants, vs Compania Colombiana del Caribe, SA, appellee*, to the end that this

cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals for the Fifth Circuit be reversed by this court, and for such other and further relief as this court may deem proper.

EBERHARD P. DEUTSCH,
HARRY F. STILES, JR.,
Counsel for Petitioner.

New Orleans, August . . . ., 1949.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1949

No. .....

SWIFT & COMPANY PACKERS, et al.,
Petitioners and Appellants Below,

versus

COMPANIA COLOMBIANA DEL CARIBE, SA.,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below

Neither the original majority and dissenting opinions of the judges of the Circuit Court of Appeals for the Fifth Circuit, nor the majority and dissenting opinions on petition for rehearing in the same court, all annexed to the record, have as yet, so far as counsel can learn, been reported.

The original memorandum opinion of one of the judges of the District Court for the Canal Zone, upholding the position of appellants (Tr. pp. 70-72) does not seem to have been reported. Subsequent reversing opinions of the other district judge (Tr. pp. 104, 157) are reported at 83 F. Supp. 273.

II

Jurisdiction

Jurisdiction is invoked under section 1254 of Title 28 of the United States Code.

The opinions of the Court of Appeals for the Fifth Circuit were filed May 30, 1949. A petition for rehearing was filed June 17, 1949, and rehearing was denied, with majority and dissenting opinions, on July 20, 1949.

As shown in the petition for the writ of certiorari in support of which this brief is filed, the Court of Appeals has decided important questions of federal jurisdiction, one of them in conflict with an applicable decision of the Court of Appeals for the Ninth Circuit; and, in any event, none of such questions has been, and all should be, settled by this court.

As to the importance of the questions of federal jurisdiction involved, the dissenting judge of the Court of Appeals referred to "the far reaching effect and import" of the decision, under which, as a precedent, foreign ship owners may "effectively oust our federal courts of admiralty jurisdiction in attachment proceedings"; and to

the fact that "this is an important case" whose issues "will touch the business life of our Republic in a vital way".

III

Statement of the Case

The preceding petition for writ of certiorari contains a "Summary Statement of the Matter Involved",* which is adopted, without repetition, as the "Statement of the Case" of this brief.

IV

Specification of Errors.

1. The court erred in holding that a district court of the United States has discretion to decline jurisdiction of a proceeding instituted by a citizen of the United States against foreign respondents, for loss of cargo shipped under bills of lading expressly made subject to the Carriage of Goods by Sea Act of the United States, one of respondent's defenses being a plea of limitation of liability under statutes of the United States, even though citizens of other countries are joined as libelants (for their own interests) and the cargo was moving between foreign ports when lost.

2. The court erred in holding that the question as to whether a district judge of the United States, prior to his retirement, properly refused to decline discretionary jurisdiction of a proceeding in admiralty, is open to review by his successor in office.

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* Pp. 2-10, ante.

3. The court erred in holding that a district court of the United States, sitting in admiralty, does not have jurisdiction to determine for itself whether a vessel seized under process of foreign attachment is actually the property of a foreign respondent.

4. The court erred in holding that a mere proctor's affidavit on information and belief, to the effect that a vessel seized under process of foreign attachment is not owned by the respondent, filed in an admiralty proceeding in a district court of the United States in support of a motion to dismiss and vacate the attachment for want of jurisdiction of the court, places on the libelant the burden of showing why the vessel should be held and jurisdiction maintained.

V

Summary of the Argument

Point A

A district court of the United States has no discretion to decline jurisdiction of a proceeding instituted by a citizen of the United States and others against foreign respondents for loss of cargo shipped between foreign ports under bills of lading expressly governed by the Carriage of Goods by Sea Act of the United States, one of respondent's defenses being a plea of limitation of liability under statutes of the United States.

Point B

The question as to whether a district judge of the United States, prior to his retirement, properly refused to decline discretionary jurisdiction of a proceeding in admiralty is not open to review by his successor in office.

Point C

A district court of the United States, sitting in admiralty, has jurisdiction to determine for itself whether a vessel seized under process of foreign attachment is actually the property of a foreign respondent.

Point D

A mere proctor's affidavit on information and belief, to the effect that a vessel seized under process of foreign attachment is not owned by the respondent, filed in an admiralty proceeding in a district court of the United States in support of a motion to dismiss and vacate the attachment for want of jurisdiction of the court, does not place on the libelant the burden of showing why the vessel should be held and jurisdiction maintained.

VI

Argument

Point A

A district court of the United States has no discretion to decline jurisdiction of a proceeding instituted by a citizen of the United States and

> others against foreign respondents for loss of cargo shipped between foreign ports under bills of lading expressly made subject to the Carriage of Goods by Sea Act of the United States, one of respondent's defenses being a plea of limitation of liability under statutes of the United States.

As shown in the statement of facts, half of the cargo of the lost vessel was owned by a citizen of the United States. Its name appears on the bills of lading issued for the cargo. The bills of lading contain an express provision to the effect that they are subject to the Carriage of Goods by Sea Act of the United States.[1] One of the foreign respondents, in its answer, further "invokes the benefit of the provisions of the Revised Statutes of the United States . . . in limitation of the liability of shipowners".[2]

Joined with the citizen of the United States as libelants are several citizens of Cuba and one of Colombia, each, however, suing for his own interest. The cargo was moving from a port in Ecuador to ports in Cuba when it was lost. Both respondents are, on the record, Colombian corporations. Questions of foreign law may be involved in a determination of the issue as to validity of the purported transfer of the vessel between the respondents.

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[1] 49 Stat. 1207-1213; 46 USC 1300-1315. "This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the USA, and the carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act. To the extent that any term of this bill of lading is repugnant to, or inconsistent with anything in such Act, it shall be void." R 51, 54, 57. In its answer, one of the respondents pleads that it "is entitled to all exemptions and defenses provided for" in a section of that act, and that it "is excused from liability under the appropriate section of the" act. R 76, 77.

[2] R 79.

A citizen of the United States should not be denied access to the courts of his own country merely because his case involves an incidental question as to whether a purported transfer between foreign respondents among themselves was fictitious, especially when the citizen of the United States pleads that the transfer was in fraud of his rights.

The main issue of the case, it must be remembered, centers around a claim for lost cargo shipped under a bill of lading whose provisions are, by their own terms, to be construed under a statute of the United States, specifically pleaded by way of defense, in the answer.[3] One of the foreign respondents further invokes another statute of the United States by way of defense. That respondent "knew, or should have known, that it was dealing with a citizen of the United States, as the ultimate owner of fifty per cent. of the cargo of the vessel".[4]

No direct precedent has been found holding that in such a case, a district court of the United States has no discretion to decline jurisdiction. Cases which hold that exercise of discretion on the part of a district judge in declining to take jurisdiction of proceedings in admiralty exclusively between foreigners will not be disturbed unless abused,[5] obviously do not sanction such an exercise of discretion as to a proceeding instituted by a citizen of the United States, even when joined by non-citizens appearing exclusively for the assertion of their own separate interests.

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[3] R. 76, 77.
[4] Dissenting opinion, p. 16.
[5] Canada Malting Company vs Paterson Steamships, 285 US 413; Charter Shipping Co. vs Bowring, 281 US 515.

It is submitted, however, that the holding of this court in *In re Louisville Underwriters*,[6] is equally applicable to the situation at bar: "To compel suitors in admiralty . . . to resort to the home of the defendant, and to prevent them from suing him in any district in which . . . his goods or credits (may be) attached . . . would in many cases amount to a denial of justice."[7]

It is respectfully submitted that a district court must accept jurisdiction in such a case, and may not, in its discretion, decline to do so.

Point B

The question as to whether a district judge of the United States, prior to his retirement, properly refused to decline discretionary jurisdiction of a proceeding in admiralty is not open to review by his successor in office.

It will be recalled that respondents originally filed a motion to dismiss and vacate the attachment for want of jurisdiction, on March 15, 1948. This motion was denied on March 31 by the district judge then in office. He retired on the following day.

Later, a successor judge was appointed, a second motion to dismiss and vacate was filed, and the matter was submitted to him. He expressly sustained the first mo-

[6] 134 US 488.
[7] Ibid., at p. 493.

tion,[8] stating that he declined, in any event, to exercise his right to take jurisdiction.[9]

In other words, the first judge exercised his discretion, if he had it, to take jurisdiction of the case when the matter came up under the motion filed March 15. His successor reviewed that exercise of discretion, reversed it, and declined to take jurisdiction under the same motion.

No precedent has been found directly on this point. It has been held, however, that the exercise of discretion by a district court as to whether it will entertain an action in admiralty solely between foreigners will not be disturbed, even on appeal, unless the discretion has clearly been abused.[10]

It is submitted that a district judge should not be permitted to hold that his predecessor had abused his discretion in taking jurisdiction of a case, reverse that discretion, and dismiss the proceeding.

Point C

A district court of the United States, sitting in admiralty, has jurisdiction to determine for itself whether a vessel seized under process of foreign attachment is actually the property of a foreign respondent.

The district judge held that he had no jurisdiction, as a court of admiralty, to adjudicate the issue as to whether

[8] "The motion on which the court acted was filed herein on March 15, 1948 . . ." R 158.
[9] R 112.
[10] Canada Malting Company vs Paterson Steamships, 285 US 413; Charter Shipping Co. vs Bowring, 281 US 515.

the vessel attached was actually the property of respondent,[11] and the majority of the Court of Appeals held the jurisdiction to be "doubtful".[12]

One must not let the trees obscure the forest. The proceeding is one by a citizen of the United States for loss of cargo. The proceeding was instituted by foreign attachment. The respondents contend that a few days before the attachment, the vessel attached had been transferred by the respondent alleged to be at fault in the loss of the cargo. Libelants contend that the transfer was fictitious and in fraud of their rights.

This controversy as to transfer of the vessel, is clearly only incidental to the main issue for negligent loss of cargo. Can it be said that a citizen of the United States may be deprived of access to the courts of his own country, by such a device used by foreign respondents, and that a court of the United States may say that the legality of the device may be determined only by the courts of respondents' country, and that accordingly the United States court is without jurisdiction of the main controversy, under the attachment?

As stated by the dissenting judge of the Court of Appeals in the case at bar: "The import of this decision, as precedent, appears to be that when foreign ship owners

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[11] R 163.

[12] Opinion, p. 8. "We held only that the question of the organization of the corporation Caribe and its relationship to the corporation Transmaritima, and its liability for the latter's debts, involved transactions in the Republic of Colombia and under its laws, with the witnesses and evidence located there, and that the supplementary libel *in personam* against Caribe might be dismissed for that reason." Opinion of majority of Court of Appeals on petition for rehearing, p. 2.

are about to be haled into our courts to answer for their negligence they may escape liability by a fraudulent transfer and sale of their vessels in a foreign jurisdiction, and thereby effectively oust our federal courts of admiralty jurisdiction in attachment proceedings." [13]

It may be, as suggested by the majority of the Court of Appeals, that "there is no precedent" for the right of a court of admiralty to take jurisdiction of a case to determine whether property has been transferred in fraud of a creditor "before a judgment has been obtained" against the person alleged to have effected the fraudulent transfer.[14]

It is submitted, however, that such cases as *Lee vs Thompson*,[15] *Gardner vs Dantzler*,[16] and the others cited by the dissenting judge of the Court of Appeals [17] are so closely analogous in their holdings and dicta as to constitute precedents for the point involved.

It is further submitted that if these cases are not directly in point, and, as held by the majority of the Court of Appeals, "there is no precedent" for the point, this court should settle this important question of federal jurisdiction as to whether an admiralty court of the United States is competent to determine whether property seized under its process of foreign attachment belongs to the respondent, and whether a transfer thereof was fictitious and in fraud of the rights of the libelant.

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[13] Opinion, p. 19.
[14] Opinion, p. 8.
[15] Fed. Cas. 8202.
[16] 98 F2d 478 (CCA 5).
[17] Opinion, p. 12.

Point D

A mere proctor's affidavit on information and belief, to the effect that a vessel seized under process of foreign attachment is not owned by the respondent, filed in an admiralty proceeding in a district court of the United States in support of a motion to dismiss and vacate the attachment for want of jurisdiction of the court, does not place on the libelant the burden of showing why the vessel should be held and jurisdiction maintained.

The majority of the Court of Appeals held that while the affidavits and exhibits were "not of the most satisfactory kind", they were nevertheless sufficient "to require the libelants to show some cause why the vessel should be held as the property of respondents".[18]

The dissenting judge of the Court of Appeals felt that "there was no competent evidence whatever introduced in support of the motion . . . The affidavits and exhibits of respondents' counsel . . . are highly prejudicial and objectionable as self-serving, hearsay declarations, and should never have been considered by the district court".[19]

The only evidence before the district court in behalf of respondents were the affidavits of their proctor, made on information and belief, and certain exhibits annexed to those affidavits. The Federal Rules of Civil Procedure apply, by analogy and in the absence of conflicts, to proceedings in admiralty. Rule 56(e) provides: "Supporting . . . affidavits shall be made on personal knowledge,

[18] Opinion, p. 17.
[19] Opinion, p. 15.

shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Copy of a vessel's registry has been held by this court not to constitute evidence of title or ownership.[20] There is ample precedent that foreign law must be proven in admiralty as any other fact, and will not be accepted on a mere certificate.[21] A district court of the United States should, in any event, hardly accept, as having evidentiary value, the opinion of a Colombian lawyer to the effect "that the courts of justice of the Canal Zone completely lack jurisdiction to make a decision on the claim against" two Colombian corporations.

As hereinabove noted, there would seem to be a direct conflict on this point between the decision in the case at bar, and that of the Court of Appeals for the Ninth Circuit in *The Celtic Monarch*.[22] In the cited case, attachment of a vessel under a libel *in rem* for collision damage was sought to be vacated under a rule of the district court of Washington, precisely the same as that of the Canal Zone court.

An answer was filed, setting up defenses to the libel, including new facts. On this answer, supported by two affidavits of eyewitnesses to the collision, the claimant of The Celtic Monarch moved for summary dismissal of the attachment under Rule 35 of the district court of Washington, identically the same in its terms as Rule 23 of the Canal Zone district invoked at bar.

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[20] The Navemar, 303 US 68.

[21] Christie vs Carlisle, 11 F2d 659 (ED La.); Avalon-Presidente Wilson, 1929 AMC 1602 (SD NY); The Hanna Neilson, 25 F2d 984 (WD Wash.).

[22] 138 Fed. 711 (CCA 9).

The Washington district court accepted as true the new facts in the answer and supporting affidavits, and held the case to be one subject to summary judgment under its local Rule 35, which might be "finally disposed of in that summary proceeding, resembling a motion for judgment on the pleadings in an atcion at law".

The Court of Appeals pointed out that Admiralty Rule 51 (now 48) provides that new facts pleaded by a respondent are deemed denied by the libelant, and it could "see no possible justification" for summary dismissal of attachment of a vessel in admiralty on answer and affidavits involving issues forming part of the merits of the controversy: "Upon these issues the libelant was clearly entitled to give evidence, and it is manifest that the merits of the cause could not properly be disposed of in advance of the determination of those issues."[23]

In the case at bar, involving a situation at least closely analogous to that in the cited case, the majority of the Court of Appeals for the Fifth Circuit upheld release of attachment of the vessel by the district court on summary process by affidavit under an identical local rule, saying: "The affidavit evidence and the exhibits, while not of the most satisfctory kind, were enough under this rule to require the libelants to show some cause why the vessel should be held as the property of respondents. Neither on the hearing, nor on the rehearing . . . have libelants proved anything at all to support their contention[24] . . .

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[23] Ibid., at p. 718.

[24] The dissenting judge took "issue with the statement of the majority" that libelants had failed to offer such proof. "Evidently", he said, "they ignore the fact that libelants introduced . . . testimony of disinterested parties in other proceedings in the Federal courts" which "sheds considerable doubt on the good faith of the alleged transfer." Opinion, p. 18.

As a summary remedy the motion to vacate was properly sustained."[25]

The close analogy between the two cases, and the conflict in the holdings of the Courts of Appeals for the Fifth and Ninth circuits, are emphasized in the language of the dissent in the case at bar, strikingly similar to that of the Ninth Circuit, quoted above:[26] "They (the majority) are actually deciding the case on its merits adversely to libelants without according them the hearing to which they are entitled."[27]

It is accordingly respectfully submitted that for the reasons stated in the petition and in this brief, a writ of certiorari should issue herein to enable this court to settle the important points of federal jurisdiction on all of which there has been such sharp division among the judges of the courts below, and on one of which there is an apparent conflict between the holding of the Court of Appeals for the Fifth Circuit in the case at bar and that of the Ninth Circuit in a prior case.

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[25] Opinion, p. 7.
[26] See footnote 23, supra.
[27] Opinion on application for rehearing, p. 5.

Respectfully submitted,

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